Tay Kok Wah v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–90 OF 2010
SULAIMAN DAUD, SYED AHMAD HELMY AND APANDI ALI JJCA
25 JANUARY 2012

B

Criminal Law — Murder — s 302 of the Penal Code — Whether proved

C

Evidence — Adverse inference — Failure of prosecution to call witness — Whether adverse inference could be drawn — Whether trial judge correct in invoking adverse inference against accused — Evidence Act 1950 s 114(g)

D

The appellant was charged for the offences of murder under s 302 and rape under s 376 of the Penal Code ('Code'). However, at the end of the prosecution case, he was convicted for the charge under s 302 and sentenced to death but the trial judge found that there was no prima facie case for the charge under s 376. It was the appellant's defence that he and three others namely Nathan Kumar ('SP14'), Thanabalan and Ngendran, intended to break in the deceased's house to steal her laptop. While Ngendran was on the look-out, Thanabalan and SP14 entered the house. Fearing that he would be identified by the deceased due to their sexual relationship prior to the incident, the appellant did not enter the house. In dismissing the appellant's version, the learned judge invoked adverse inference under s 114(g) of the Evidence Act 1950 ('Act') for the appellant's failure to conjure Thanabalan dan Ngendran. Relying on the circumstantial evidences deduced, the learned judge then arrived to the findings that: (a) based on the discovery of the appellant's fingerprints on the window panes at the rear of the house, it was only the appellant who went into the house of the deceased, with the assistance of SP14 to gain entry; (b) the appellant's DNA profile of semen stain on the bed sheet was the evidence that the appellant was physically present in the deceased's bedroom; and (c) the victim had suffocated to death as a pillow case was stuffed into her mouth, causing death due to asphyxia. On appeal at the Court of Appeal, learned counsel for the appellant raised four main grounds that: (a) the prosecution had failed to satisfy the court protocols in ensuring the various blood samples were not mixed up to the prejudice of the appellant; (b) there was a broken-chain of the DNA evidence as the prosecution failed to call the doctors and one Sjn Samsiah who handled the blood samples; (c) in accepting the evidence of SP14, the trial judge had misdirected himself; (d) the learned judge ought to have invoked adverse inference against the prosecution for failing to call or at least offer the accomplices for purposes of cross-examination; and (e) the trial judge had erred on the burden of proof and

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worsened the case by invoking adverse inference under s 114(g) as Ngendran and Thanabalan ought to have been called by the prosecution.

Held, allowing the appeal and setting aside conviction and sentence:

(1) To preserve the integrity of the exhibits, it was essential for the prosecution to maintain the chain of evidence of the exhibits. In evidence, no labeling was done by the doctors or the handlers before it was handed to the investigating officer ('IO'). There was no evidence as to the movement of the blood samples from the moment they were taken by the unidentified doctors to the point when they were handed to the IO and Sjn Samsiah, the last person who handled the blood samples was also not called. Visibly, there was a break in the chain of evidence of the blood samples, which in the circumstances of the case, when the prosecution relied heavily on scientific analysis or DNA, was fatal as such break created a reasonable doubt on the DNA evidence (see paras 15–16).

(2) SP14's evidence should have been taken with caution as he was arrested as a suspect and was an accessory before the fact. Nowhere in the learned judge's grounds of decision had indicated that he exercised a maximum evaluation on SP14's evidence. The trial judge's brief comment of SP14's evidence consisted of only three sentences and such brief comment did not reflect an exercise of maximum evaluation of SP14's evidence (see paras 17–18).

(3) Ngendran and Thanabalan were material witnesses as they were accessories before the fact and were arrested for the same offence which the appellant was charged with. Their blood samples were even taken for purposes of DNA evidence. The failure of the prosecution to call them or offer them for cross-examination or to tender their statements under s 112 would have triggered the adverse presumption under s 114(g) of the Act. The prosecution might have kept away their evidences as the might not pass the test of witnesses truth. However, their evidence was essential in order to unfold the narrative which the prosecution case was based on (see paras 19–20).

(4) Instead of invoking the adverse inference against the prosecution, the learned judge invoked it against the appellant. The approach was in contrast with criminal law and procedure. It is settled law that no adverse inference can be drawn against an accused person if he offered no evidence. Furthermore, an accused person need not prove anything but only to raise a reasonable doubt. In drug or corruption cases, the burden of proof may shift to the accused person where the substantive law provided the presumption of law where such provisions presumed the fact as proven until evidence to the contrary is given. However, in the murder case at hand, there was no presumptive provision (see paras 22, 24–26).

[Bahasa Malaysia summary

Perayu telah dituduh membunuh di bawah s 302 dan rogol di bawah s 376 Kanun Keseksaan ('Kanun'). Walau bagaimanapun, di akhir kes pendakwaan, dia telah disabitkan dengan pertuduhan di bawah s 302 dan dihukum mati tetapi hakim bicara mendapati bahawa tiada kes prima facie bagi pertuduhan di bawah s 376. Adalah pembelaan perayu bahawa dia dan tiga yang lain iaitu Kumar Nathan ('SP14'), Thanabalan dan Ngendran, berniat memecah masuk rumah si mati untuk mencuri komputer ribanya. Sedang Ngendran memerhati, Thanabalan dan SP14 memasuki rumah tersebut. Khuatir dia akan dikenal pasti oleh si mati kerana hubungan seksual mereka sebelum kejadian tersebut, perayu tidak masuk ke rumah. Dalam menolak versi perayu, yang arif hakim membangkitkan tanggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 ('Akta') atas kegagalan perayu untuk memanggil Thanabalan dan Ngendran. Bergantung kepada itu keterangan ikut keadaan yang dikemukakan, yang arif hakim menyimpulkan bahawa: (a) berdasarkan kepada penemuan cap jari perayu di anak tetingkap di belakang rumah, hanya perayu yang memasuki rumah si mati dengan bantuan SP14 untuk masuk; (b) kesan profil DNA semen perayu di cadar katil adalah bukti bahawa perayu hadir secara fizikal dalam bilik tidur si mati; dan (c) mangsa telah mati lemas kerana mulutnya disumbat dengan sarung bantal, menyebabkan kematiannya akibat daripada *asphyxia*. Di Mahkamah Rayuan, peguambela bagi perayu yang membangkitkan empat alasan utama iaitu: (a) pihak pendakwaan telah gagal untuk memenuhi protokol mahkamah dalam memastikan pelbagai sampel darah tidak bercampur-aduk sehingga menjejaskan perayu; (b) Putusnya rantaian bukti DNA kerana pihak pendakwaan gagal untuk memanggil doktor dan Sjn Samsiah yang mengendalikan sampel darah; (c) dalam menerima keterangan SP14, hakim bicara telah salah arah dirinya; (d) yang arif hakim seharusnya membangkitkan tanggapan bertentangan terhadap pendakwaan kerana gagal memanggil atau sekurang-kurangnya menawarkan kepada rakan sejenayah untuk tujuan pemeriksaan balas; dan (e) hakim bicara telah terkhilaf dalam beban pembuktian dan memberatkan lagi kes dengan membangkitkan tanggapan bertentangan di bawah s 114(g) kerana Ngendran dan Thanabalan sepatutnya dipanggil oleh pihak pendakwaan.

Diputuskan, membenarkan rayuan dan mengenepikan sabitan dan hukuman:

(1) Untuk memelihara integriti ekshibit-ekshibit tersebut, adalah penting bagi pihak pendakwaan untuk mengekalkan rantaian bukti ekshibit-ekshibit. Dalam keterangan, tiada pelabelan dilakukan oleh doktor-doktor mahupun pengendali-pengendali sebelum ia diserahkan kepada pegawai penyiasat ('PP'). Tiada bukti pergerakan sampel darah dari saat ia diambil oleh doktor yang tidak dikenali ke titik yang mana kesemuanya diserahkan kepada PP dan Sjn Samsiah, orang terakhir yang mengendalikan sampel darah juga tidak dipanggil. Secara jelas, terdapat pemutusan rantaian keterangan sampel darah, yang dalam hal keadaan

A kes tersebut, apabila pihak pendakwaan amat bergantung kepada analisis saintifik atau DNA, menjejaskan kerana ia menimbulkan keraguan yang munasabah pada bukti DNA (lihat para 15–16).

(2) Keterangan SP14 seharusnya diambil dengan berwaspada kerana dia telah ditangkap sebagai suspek dan merupakan aksesori kepada fakta. Tiada mana-mana dalam keputusan hakim yang menunjukkan bahawa dia telah menjalankan penilaian maksimum ke atas keterangan SP14. Ulasan ringkas hakim bicara mengenai keterangan SP14 terbentuk dengan hanya tiga ayat dan ulasan yang pendek tersebut tidak mencerminkan beliau menjalankan penilaian maksimum terhadap keterangan SP14 (lihat perenggan 17–18).

(3) Ngendran dan Thanabalan adalah saksi penting kerana mereka adalah aksesori kepada fakta dan telah ditangkap kerana kesalahan sama yang mana perayu telah didakwa. Sampel darah mereka telah pun diambil bagi tujuan bukti DNA. Kegagalan pihak pendakwaan untuk memanggil mereka atau menawarkan mereka untuk pemeriksaan balas atau mengemukakan kenyataan mereka di bawah s 112 akan mencetuskan tanggapan bertentangan di bawah s 114(g) Akta. Pihak pendakwaan mungkin telah menyimpan keterangan mereka kerana ia mungkin tidak lulus ujian kebenaran saksi. Walau bagaimanapun, keterangan mereka adalah penting dalam usaha untuk membuka naratif sandaran kes pendakwaan (lihat perenggan 19–20).

(4) Yang arif hakim sepatutnya membangkitkan tanggapan bertentangan terhadap pendakwaan, sebaliknya telah membangkitkannya terhadap perayu. Pendekatan ini adalah bertentangan dengan undang-undang jenayah dan prosedur. Ia adalah undang-undang tetap bahawa sebarang tanggapan bertentangan boleh dibuat terhadap seseorang tertuduh jika dia tidak memberikan sebarang bukti. Tambahan pula, seseorang tertuduh tidak perlu membuktikan apa-apa tetapi hanya perlu menimbulkan keraguan munasabah. Dalam kes-kes dadah atau rasuah, beban bukti boleh beralih kepada orang yang dituduh di mana undang-undang substantif menyatakan bahawa anggapan undang-undang di mana peruntukan-peruntukan tersebut yang menganggap fakta sebagai terbukti sehingga keterangan yang bertentangan dikemukakan. Walau bagaimanapun, dalam kes pembunuhan ini, tidak ada anggapan peruntukan tersebut (lihat perenggan 22, 24–26).]

Notes

For a case on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 1388.

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 190–203.

Cases referred to

Abu Bakar v Regina [1963] MLJ 288 (refd)
Abdul Aziz bin Lela v PP [2011] 5 MLJ 750; [2011] 7 CLJ 1, CA (folld)
Baharom v PP [1960] MLJ 249, CA (refd)
Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Goh Ah Yew v PP [1949] MLJ 150 (refd)
Khoon Chye Hin v PP [1961] MLJ 105, CA (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Tan Gong Wai & Anor [1985] 1 MLJ 355 (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Teoh Hoe Chye v PP [1987] 1 MLJ 220, SC (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 s 114(g)
Penal Code ss 112, 302, 376

Appeal from: Criminal Suit No 45–51 of 2008 (High Court, Shah Alam)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Apandi Ali JCA:

INTRODUCTION

[1] The appellant was convicted for the offence of murder under s 302 of the Penal Code and sentenced to death. The charge against the appellant reads as follows:

> Bahawa kamu, pada 2 Ogos 2007, jam lebih kurang 4.30 pagi di rumah beralamat No. 27 Jalan Putra 4/1, Seksyen 1 Bandar Mahkota Cheras, Kajang dalam Daerah Kajang, dalam Negeri Selangor, telah membunuh Tang Lai Meng No. Kad Pengenalan 871004-08-5384 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The appellant was also charged for an offence under s 376 of the Penal Code, which was alleged to have taken place at the same place and time and in respect of the same victim, namely the deceased in the murder charge.

[3] At the end of the prosecution case, the learned trial judge found that there was no prima facie case in respect of the charge under s 376 of the Penal Code

and accordingly acquitted and discharged the appellant in respect of the charge. However, based on the same facts and evidence, the learned trial judges found that there was a prima facie case in respect of the murder charge. The trial then proceeded in respect of the murder charge only, which concluded with the appellant's conviction. It is noted that there was no appeal against the acquittal in respect of the rape charge by the prosecution.

FACTUAL BACKGROUND

[4] From what was stated in the opening speech the prosecution had intimated that they are relying on circumstantial evidence and forensic evidence to prove their case. It was also intimated that evidence will be adduced to show that it was the appellant who forcibly entered the house of the deceased and committed the offences of rape and murder of the deceased.

[5] The facts of the case are well set out in the trial judge's grounds of judgment. We do not intend to repeat them. The salient facts of forced entry into the house of the deceased was adduced through SP14, who assisted the appellant to gain entry. The evidence of the commission of the offence was adduced through circumstantial evidence as testified by the crime scene investigator, SP17, the forensic analyst, SP18 and the pathologist, SP16.

[6] The cause of death was due to 'Asphyxia due to gagging with cloth'.

FINDING BY THE HIGH COURT

[7] The learned trial judge made the following findings of facts:

(a) that although the appellant was assisted by SP14 to gain entry into the house of the deceased, it was only the appellant who went into the house. (This conclusion was deduced from the discovery of the appellant's fingerprints on the window panes at the rear of the house.);

(b) that the appellant was physically present in the bedroom of the deceased on the material date.
(This was deduced from the DNA profile of semen stain on the bed sheet, which matched with the DNA of the appellant.); and

(c) that the victim had suffocated to death because a pillow case was stuffed into her mouth and that caused the death due to asphyxia.

[8] In arriving at such findings, the learned trial judge wrote in his judgment, as follows:

In coming to the prima facie finding that the accused was the person who had caused the victim's death, the court is relying on circumstantial evidence viz the fingerprints of the accused found on the window panes of the kitchen window of the victim's house and the DNA of the accused recovered from the semen stain found on the bed sheet of the victim's bed.

The circumstantial evidence read with the testimony of SP14 that the accused had broken into and entered the victim's house on 2 August 2007, lead the court to only one conclusion viz that the accused was the person that had forcefully tied up the victim, stuffed a pillow case into her mouth and tied another pillow case around her neck thus causing the victim to suffocate to death.

[9] In his defence, the appellant narrated that on the early morning of the incident; he went to the victim's house together with SP14, Thanabalan and Ngendran. Their common intention was to break in and steal the victim's laptop. According to the appellant, Ngendran acted as a look-out and it was Thanabalan and SP14 who entered the victim's house. The appellant did not enter the house as he was afraid that he might be identified by the victim because he had on several occasion prior to the incident have had consensual sexual relationship with the victim.

[10] The learned trial judge dismissed the appellant's version as improbable and in the course of such findings invoked the adverse inference under s 114(g) of the Evidence Act against the appellant, for failing to call the two accomplices, namely Thanabalan and Ngendran.

[11] For the above reasons, the High Court held: 'that the prosecution has established the charge of murder against the accused beyond a reasonable doubt.'

CONTENTIONS BY THE APPELLANT

[12] Learned counsel for the appellant raised four main grounds of appeal:

(a) that the prosecution has failed to satisfy the court that the protocols in ensuring that the various blood samples were not mixed up to the prejudice of the appellant.
Corollary to this ground, it was also submitted that the failure to call the doctors and one Sjn Samsiah who handled the blood-samples had caused a broken-chain in respect of the vital DNA evidence;

(b) that the learned trial judge misdirected himself when he accepted the evidence of SP14, Nathan Kumar, at face value. This is particularly so, when SP14 is an accessory before and after the fact;

(c) that the learned trial judge ought to have invoked the adverse inference

against the prosecution for failing to call or at least offer both Ngendran and Thanabalan for purposes of cross-examination; and

(d) that the trial judge had erred on the burden of proof imposed on the appellant and made it worst by invoking the s 114(g) adverse inference against the appellant for failing to call the earlier mentioned two witnesses that ought to have been called by the prosecution.

OUR ANALYSIS AND FINDINGS

[13] We shall deal with the respective grounds put forward by the appellant.

Ground No (1)

[14] It is clear from the evidence that the prosecution had relied heavily on DNA evidence to prove its case against the appellant. This was intimated by the prosecution in their opening speech, exh P3. Blood samples of individuals were taken for DNA analysis. This piece of evidence was adduced through SP19, DSP Chung Chin Mok, the investigating officer of this case. The six individuals from which blood samples were taken and marked as exhibits are as follows:

(a) Puan Wing Kah, SP15 and whose blood samples were marked as P50A and P50B;

(b) Ngendran (not called as a witness) and whose blood samples were marked as P51A and P52B;

(c) Thanabalan (also not called as a witness) and whose blood samples were marked as P52A and P52B;

(d) Nathan Kumar, SP14 and whose blood samples were marked as P53A and P52A;

(e) Tay Kok Wah, the appellant, and whose blood samples were marked as P30B and P30C; and

(f) Tan Lai Meng, the deceased victim and whose blood samples were marked as P31B, P31C, P31D and P31E.

[15] Except for the deceased victim, the blood samples were taken from all the individuals on the basis of being suspects in the police investigations of the case. The blood samples were taken by no less than three different doctors. Except for one Dr Shanti Kantasamy (who was not called as a witness) who took the blood samples of the appellant, the other doctors were not identified. In evidence, it was also disclosed that all the blood samples were handed over to one Sjn Samsiah before they were handed over to the IO SP19. There were no evidence as to whether there was any labelling done by the doctors or by others

who handled the blood samples before they came into the possession of the IO. There was also no evidence as to the movement of the blood samples from the moment the samples were taken by the unidentified doctors to the point when they were handed over to the IO. The last person who handled the blood samples, Sjn Samsiah, before the blood samples were handed over to the IO was also not called.

[16] From the above evidence, it is our judgment that there is a break in the chain of evidence of the blood samples, which in the circumstances of the case, when the prosecution is relying on scientific analysis or DNA, is fatal as such break had created a reasonable doubt on the DNA evidence. To preserve the integrity of the exhibits where the prosecution relied heavily on DNA evidence, it is essential for the prosecution to maintain the chain of evidence of the exhibits. On this issue, we could not agree more with what was held by the Court of Appeal in *Abdul Aziz bin Lela v Public Prosecutor* [2011] 5 MLJ 750; [2011] 7 CLJ 1.

Ground No (2)

[17] SP14's evidence should have been taken with caution. This is so as he was arrested as a suspect and was an accessory before the fact. It was not in dispute that SP14 did help the appellant to gain entry into the house, namely by removing the window panes and also by bending the grilles with a hoe. SP14 was also an accessory after the fact, in helping to hide the car stolen from the deceased. To evaluate the truthfulness of SP14's story of going to sleep after helping to bend the grilles at the victim's house on the morning of the incident, it is appropriate to test it with the actions of SP14 both before and after the event. It is incumbent to appreciate the probable reason as to why SP14 was distancing himself from the crime scene. Is SP14's story reasonable? If there is doubt as to its truthfulness, SP14 could not be taken as a witness of truth. Nowhere in the learned trial judge's grounds of decision that indicated that had he exercised such maximum evaluation of SP14's evidence. The trial judge's brief comment of SP14's evidence consisted of three sentences only, which reads as follows:

> The court finds that SP14's testimony is consistent and credible that he had merely assisted the accused in entering the victim's house upon the request of the latter. SP14 was never the accomplice of the accused in the murder of the victim. The court is therefore able to accept the testimony of SP14 in establishing the fact that the accused alone had broken into and entered the victim's house upon the request of the latter. SP14 was never the accomplice of the accused in the murder of the victim. The court is therefore able to accept the testimony of SP14 in establishing the fact that the accused alone had broken into and entered the victim's house on 2 August 2007.

[18] It is our judgment that such brief comment is not a reflection of an exercise of maximum evaluation of SP14's evidence.

Ground No (3)

[19] It is our judgment that both Ngendran and Thanabalan are material witnesses as they were accessories before the fact and were arrested for the very offence which the appellant was charged with and had their blood samples taken for purposes of DNA evidence. The failure of the prosecution to call them, or offer them for cross-examination or to tender their s 112 statements, in the circumstances of the evidence as a whole, would have triggered the adverse presumption under s 114(g) of the Evidence Act 1950.

[20] The evidence of both Ngendran and Thanabalan may have been kept away by the prosecution because they may not pass the test of witnesses of truth (see *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105). But from the facts of this case, namely their roles prior to the entry into house of the victim make their evidence as essential to unfold the narrative upon which the prosecution case is based on (see *Seneviratne v R* [1936] 3 All ER 36 and *Teoh Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220).

[21] Furthermore, since other suspects were arrested during the course of the investigations into this case, the prosecution does have a duty to adduce evidence to eliminate the involvement of the other suspects. There must be irresistible evidence that despite the presence of others, all evidence must point to the guilt of the accused person. Not having discharged its burden the adverse inference can therefore be drawn on the prosecution's failure to call these two witnesses.

Ground No (4)

[22] This last ground is inter related with ground No (3) above. It is to our astonishment that the learned trial judge, instead of invoking the adverse inference against the prosecution, did invoke such adverse inference against the appellant.

[23] The learned trial judge in his grounds of judgment, under a subheading: *Failure to call corroborating witnesses*, wrote:

> The burden of calling witnesses to corroborate the testimony of the accused is upon the accused and not the prosecution. The prosecution has prima facie established the ingredients of the charge of murder against the accused. The burden has shifted to the accused to substantiate his testimony by calling the alleged accomplices to testify viz Thanabalan and Ngendran. These two alleged accomplices could be called to counter the testimony of SP14. However, the accused has chosen not to do

so. The court finds that s 114(g) of the Evidence Act 1950 is not operated against the prosecution evidence but that of the accused.

[24] It is our judgment that the above approach is contrary to substantive criminal law and procedure. It is trite law that an accused person need not prove anything, but only to raise a reasonable doubt (see *Public Prosecutor v Tan Gong Wai & Anor* [1985] 1 MLJ 355; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137).

[25] The burden of proof may shift to the accused person, where the substantive law provides the presumption of law where such provisions presumed the fact as proved until evidence to the contrary is given. This is so in drug cases and corruption cases. But the case at hand is in respect of murder, of which there is no such presumptive provision (see *Baharom v Public Prosecutor* [1960] MLJ 249; *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649).

[26] It is also settled law that no adverse inference can be drawn against an accused person if he offers no evidence. It is never the duty upon an accused to call any evidence (see *Goh Ah Yew v Public Prosecutor* [1949] MLJ 150; *Abu Bakar v Regina* [1963] MLJ 288; *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19).

[27] On this issue, for completeness, we feel that it is appropriate to quote Raja Azlan J (as HRH then was) in *Tan Foo Su*, which reads as follows:

> It is the duty of the court to consider the defence story which may produce one of three results, namely, that if the court is convinced of the truth of the accused's story or that it created a reasonable doubt as to guilt, then the court must acquit the accused person. Sometimes the defence story strengthens the prosecution case and in that case the court has to find the accused guilty. But it is not the duty of the accused person to prove his innocence, far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection. In my view, the learned magistrate overlooked the authorities on that point which are afforded by the case of *Goh Ah Yew v Public Prosecutor* [1949] MLJ 153 and the case of *Abu Bakar v R* [1963] MLJ 288 where the comment made by the trial district judge in the latter case is almost similar to the present case. In that case the appellate court said that there is no duty cast upon the defence in a criminal case to call any evidence and no inference unfavourable to him can be drawn. There the learned trial district judge appeared to have drawn an unfavourable inference because the absent witness was not called by the defence. And so in this particular case. If the learned magistrate had not over-looked those two authorities I am sure he would not have misdirected himself on this point.

A CONCLUSION

[28] Since the prosecution's case relied on circumstantial evidence, we have to adequately cautioned ourselves, in line with what was said about 'combined strength of strands to make a rope strong enough to hang' in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307. We find that the circumstantial evidence are insufficient and not strong enough to sustain the finding of guilt of the appellant. Considered cumulatively, the uncertainty in the evidence relating to the blood samples which formed the vital link to implicate the appellant and leading to the questionable integrity of the DNA findings and the fundamental error of invoking adverse inference against the appellant for his failure to call two witnesses, we are not satisfied that the prosecution had proved its case beyond reasonable doubt. The shortcomings in the prosecution's case and the errors of the learned trial judge, as discussed above, would inevitably make the conviction of the appellant unsafe.

[29] We also could not see any parallel as to how the appellant who was charged for rape of the victim was acquitted and discharged without calling for his defence, when the prosecution's case was based on the very same circumstantial evidence, forensic evidence and the evidence of SP14. It is rather odd for the court to hold that the appellant have had to opportunity to commit murder when he was acquitted for rape of the victim when the same evidence was relied upon.

[30] This paradox, in our judgment, is an indication of incorrect findings of fact. The inferences by the learned trial judge were not reasonably and properly drawn from the evidence adduced at the trial. Inferences of facts, particularly in a case solely based on circumstantial evidence cannot be one of either or. It has to be one inference only. To blow hot and cold at the same time is a sure reflection of lingering doubt in the prosecution's case. The benefit of such doubt ought to be given to the appellant. This observation is in addition to our findings of doubts as per our analysis of the evidence, as discussed earlier in the judgment.

[31] For the above reasons, we unanimously allowed the appeal by the appellant. The conviction and sentence is hereby set aside and in place we accordingly ordered that the appellant to be acquitted and discharged for the alleged offence of murder.

Appeal allowed and conviction and sentence set aside.

Reported by Ibnu Aswan